

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>COZEN O’CONNOR, P.C.,</b>	:	
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	<b>Case No. 2:11-cv-45</b>
	:	
<b>JENNIFER J. TOBITS</b>	:	<b>District Judge C. Darnell Jones, II</b>
	:	
<b>and</b>	:	
	:	
<b>DAVID M. FARLEY and</b>	:	
<b>JOAN F. FARLEY, h/w,</b>	:	
	:	
<b>Defendants.</b>	:	

**DAVID M. AND JOAN F. FARLEY’S MOTION TO DISMISS  
JENNIFER J. TOBITS’ CROSSCLAIMS PURSUANT TO FRCP 12(b)(6)**

Crossdefendants David M. and Joan F. Farley file the instant Motion to Dismiss Jennifer J. Tobits’ Crossclaims Pursuant to Fed.R.Civ.P. 12(b)(6) and allege as follows:

1. Jennifer J. Tobits’ filed a Crossclaim asserting that she was Sarah Ellyn Farley’s spouse and therefore entitled to the proceeds of the retirement plan.
2. However, to be entitled to the proceeds of the retirement plan, Ms. Tobits must be the lawful spouse. *See* ERISA § 205; *Tkachik v. Comerica Incorporated*, 2006 U.S. Dist. LEXIS 92946, at 23, 40 Employee Benefits Cas. (BNA) 1952 (E.D. Mich., 2006), *affirmed*, 268 Fed. Appx. 443, 2008 U.S. App. LEXIS 5743, 2008 FED App. 143N (6th Cir. Mich. 2008), and cases cited therein; *Croskey v. Ford Motor Company-UAW*, 2002 U.S. Dist. LEXIS 8824 at 12-14, 28 Employee Benefits Cas. (BNA) 1438 (S.D.N.Y.2002).
3. “Addressing the meaning of the term ‘spouse’ as used in ERISA § 205, all federal courts to have considered the issue have determined that the statutory term

‘spouse’ refers to the legal spouse. [citations omitted].” *Id.* ERISA mandates that “pension benefits must be paid to [the decedent plan participant’s] lawful widow, regardless of the plan’s terms and definitions.” *Id.*; *Locals 40, 361 & 417 Pension Fund v. McInerney*, 2007 LEXIS 1974, at 13, 39 Employee Benefits Cas. (BNA) 2759 (S.D.N.Y. Jan. 9, 2007).

4. It follows that an ERISA plan *cannot* pay a death benefit to a spousal claimant who is *not* a lawful spouse.

5. Where there is no surviving spouse, the Plan (at §6.2(f)) directs that the death benefit be paid to the Participant’s children, or if none, to “the Participant’s surviving parents, in equal shares.” §6.2(f)(3).

6. There are no surviving children here, so if Ms. Tobits is not Ms. Farley’s surviving spouse, the death benefit must be paid to Ms. Farley’s parents.

7. The Plan is to be interpreted according to the laws of the United States and of Pennsylvania. § 9.3.

8. The Defense of Marriage Act of 1996 (“DOMA”), 1 U.S.C. § 7, provides the dispositive federal rule of decision. Under DOMA the term “spouse” in ERISA (and in all other federal statutes and regulations) “refers only to a person of the opposite sex who is a husband or wife.” 1 U.S.C. § 7.

9. Under federal law, Ms. Tobits cannot be the lawful spouse of someone of the same sex.

10. Pennsylvania law states flatly that, “[a] marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.” 23 Pa. C.S.A. § 1704.

11. Under the laws of Pennsylvania, Ms. Tobits cannot be the lawful spouse of someone of the same sex.

12. Under the laws of Illinois, Ms. Tobits cannot be the lawful spouse of someone of the same sex. *See*, 750 ILCS 5/213.1, 750 ILCS 5/213, 5/216.

13. The issue of undue influence is moot because Ms. Tobits was not Ms. Farley's lawful spouse.

14. Since Ms. Tobits was not the lawful spouse of Ms. Farley, Ms. Tobits is not entitled to the retirement funds and failed to state a claim upon which relief can be granted.

15. Concurrence to this motion was not granted.

WHEREFORE, Joan and David Farley respectfully request that the Court dismiss both of Ms. Tobits' crossclaims.

Respectfully submitted,

/s/Randall L. Wenger

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\* Application for leave to appear *pro hac vice* on file.

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**CERTIFICATE OF SERVICE**

I, Randall L. Wenger, an attorney herein, certify that I caused this DAVID M. AND JOAN F. FARLEY'S MOTION TO DISMISS JENNIFER J. TOBITS' CROSSCLAIMS PURSUANT TO FRCP 12(b)(6) to be served on all counsel via the Court's CM/ECF system on August 22, 2011.

/s/Randall L. Wenger